

Appendix 5

EPA Administrative Order on Consent

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

007114

IN THE MATTER OF:

Cleveland Mill Superfund
Site
Grant County, New Mexico

BAYARD MINING CORP.,
MINING REMEDIAL RECOVERY
COMPANY, and
VIACOM INTERNATIONAL INC.
(as successor to Paramount
Communications Inc.),

RESPONDENTS

ADMINISTRATIVE ORDER ON
CONSENT FOR REMOVAL ACTION
FOR PHYSICAL REMOVAL

U.S. EPA Region 6
CERCLA
Docket No. 06-14-97

Proceeding Under Sections 104,
106(a) and 122 of the
Comprehensive Environmental
Response, Compensation, and
Liability Act, as amended, 42
U.S.C. §§9604, 9606(a) and
9622

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

007116

IN THE MATTER OF:

Cleveland Mill Superfund
Site
Grant County, New Mexico

BAYARD MINING CORP.,
MINING REMEDIAL RECOVERY
COMPANY, and
VIACOM INTERNATIONAL INC.
(as successor to Paramount
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RESPONDENTS

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Response, Compensation, and
Liability Act, as amended, 42
U.S.C. §§9604, 9606(a) and
9622

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent (the "Order") is entered into voluntarily by the U.S. Environmental Protection Agency (EPA) and Bayard Mining Corp., Mining Remedial Recovery Company, and Viacom International Inc. (as successor to Paramount Communications Inc.) (hereinafter collectively "Respondents"). This Order provides for a Removal Action to physically address surficial contamination, and to restore affected surface areas at the Cleveland Mill Superfund Site which is located in Grant County, New Mexico near Silver City. The Site encompasses approximately 18 acres, including, but not limited to, approximately 14 acres in the streambed of a tributary to Little Walnut Creek and Little Walnut Creek, and depicted generally on the map attached as Appendix A. This Order concerns (1) the surface contamination which includes without limitation the soils, main tailings piles, the western hillside waste piles, the cobbed ore pile, dust piles, roadbed soils, mine spoils, creek sediments, and surface water as described in the EPA Record of Decision for the Site (ROD) which was signed on September 22, 1993, and (2) restoration of the affected surface areas. This Order does not concern the remediation of groundwater contamination on the Site or other actions (e.g., operation and maintenance of the remedy) which Respondents have agreed to undertake pursuant to the judicial Consent Decree styled United States of America and New Mexico Office of the Natural Resources Trustee v. Bayard Mining Corp. et al., No. 95-0285 MV/LFG (D. New Mexico (Albuquerque)) which was entered June 15, 1995 (hereinafter the Consent Decree). Under this Order, Respondents shall perform the Removal Action described in EPA's Action Memorandum regarding the Site which was

signed on July 11, 1997. Under this Order, Respondents shall perform the Removal Action to mitigate and clean up releases and threats of releases of hazardous substances at and from the Site. Under this Order, Respondents shall reimburse the United States for response costs paid after May 1, 1997, related to the Removal Action at the Site. This Order requires Respondents to conduct the Removal Action described herein to abate an imminent and substantial endangerment to the public health, welfare or the environment that may be presented by the actual or threatened release of hazardous substances at or from the Site including without limitation arsenic, beryllium, cadmium, lead and zinc found in tailings and sediment as described in the ROD, which is incorporated into this Order as Appendix B.

2. This Order is issued pursuant to the authority vested in the President of the United States by Sections 104, 106(a) and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a) and 9622, as amended ("CERCLA"), and delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order No. 12580, January 23, 1987, 52 Fed. Reg. 2923, further delegated to the EPA Region 6 Regional Administrator by EPA Delegation Nos. 14-14-A (April 15, 1994), 14-14-C (April 15, 1994), and 14-14-D (May 11, 1994), and, subsequently, redelegated to EPA Region 6 Superfund Division Director by EPA Region 6 Delegation Nos. R6-14-14-A (August 4, 1995), R6-14-14-C (August 4, 1995), and R6-14-14-D (August 4, 1995).

3. EPA has notified the State of New Mexico of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. Respondents' execution of or participation in this Order shall not constitute or be construed as an admission of liability or of EPA's Findings of Fact or Conclusions of Law and Determinations contained in this Order or in the Action Memorandum except in a proceeding to enforce the terms of this Order. Respondents agree to comply with and be bound by the terms of this Order. Respondents further agree that they will not contest the basis or validity of this Order or its terms in any action to enforce the terms of this Order.

II. PARTIES BOUND

5. This Order applies to and is binding upon EPA, and upon Respondents and Respondents' successors and assigns. Any change in ownership or corporate status of Respondents including, but not limited to, any transfer of assets or real or personal

property shall not alter Respondents' responsibilities under this Order.

6. Respondents are jointly and severally liable for carrying out all activities required by this Order. Compliance or noncompliance by one or more Respondents with any provision of this Order shall not excuse or justify noncompliance by any other Respondent(s).

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

8. Unless otherwise expressly provided in this Order, terms used in this Order (including, but not limited to, the Statement of Work and EPA-approved submissions) which terms are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or its implementing regulations. Whenever terms listed below are used in this Order including, but not limited to, the Statement of Work and EPA-approved submissions, the following definitions shall apply:

9. "Action Memorandum" shall mean EPA's Action Memorandum for the Site signed on July 11, 1997. The Action Memorandum is attached as Appendix C to this Order and incorporated herein.

10. "ARARs" shall mean all "applicable requirements" or "relevant and appropriate requirements" as those terms are defined at 40 CFR § 300.5 and 42 U.S.C. § 9621(d).

11. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

12. "Day" shall mean a calendar day unless expressly stated to be a business day or working day. "Working day" or "business day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the end of the next working day.

13. "Deliverable" shall mean any action, activity, task, or submission required to be done by Respondents under this Order. A Deliverable is Work.

14. "EPA" shall mean the United States Environmental Protection Agency.

15. "Mining waste" or "mine waste" shall mean any waste or tailings produced by mining, milling, remilling, or related operations.

16. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 CFR Part 300, including any amendments thereto.

17. "NMED" shall mean the New Mexico Environment Department.

18. "Operation and Maintenance" or "O&M," unless otherwise indicated, shall mean all activities or measures required to maintain the effectiveness of the Removal Action (if any are so required by EPA), as defined at 40 CFR § 300.5.

19. "Order" shall mean this document, the Statement of Work, and all attachments to this document, all documents incorporated by reference into this document, all schedules and deadlines in this document, attached to this document, or incorporated by reference into this document, and any EPA-approved submissions required pursuant to the terms of this document including, but not limited to, submissions required by documents incorporated by reference into this document. EPA-approved submissions shall be incorporated into and become a part of the Order upon final written approval by EPA of such submissions.

20. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral followed by a period.

21. "Party" or "parties" shall mean EPA or Respondents who are the parties to this Order.

22. "Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations, identified in the Action Memorandum, and in this Order, including but not limited to the Statement of Work and submissions which are approved by EPA in writing.

23. "Removal Action" shall mean those activities to be undertaken by Respondents to mitigate and clean up releases and threats of releases of hazardous substances at and from the Site as those activities are described in EPA's Action Memorandum for the Site signed July 11, 1997 and according to this Order including, but not limited to, implementation of the plans and

schedules submitted by Respondents pursuant to the Work Plan approved by EPA.

24. Requirement(s) of this Order," "Requirement(s) of the Order" or a similar term shall mean: payments that Respondents are to make under this Order; Work that Respondents are to perform under this Order; scheduled deadlines that Respondents are to meet under this Order including, but not limited to, deadlines set forth in schedules in EPA-approved submissions; and any other obligation of Respondents under this Order. It is a violation of this Order for Respondents to fail to perform a Requirement of this Order.

25. "Response costs" shall mean all costs including, but not limited to, direct costs, and indirect costs paid by the United States, and the State at the direction of EPA, in order to perform or support the Removal Action at the Site, plus accrued interest. Response costs include, but are not limited to, oversight costs, cleanup costs, enforcement costs, and legal costs. "Future response costs" shall mean all response costs paid on or after May 1, 1997.

26. "Respondents" shall mean Bayard Mining Corp., Mining Remedial Recovery Company, and Viacom International Inc.

27. "ROD" shall mean EPA's Record of Decision for the Cleveland Mill Superfund Site which was signed by the Regional Administrator on September 22, 1993. The ROD is attached to this Order as Appendix B and incorporated herein.

28. "Section" shall mean a portion of this Order ~~identified~~ identified by a roman numeral and includes one or more paragraphs.

29. "Site" shall mean the Cleveland Mill Superfund Site which is located in southwestern New Mexico, approximately 5.5 miles north of Silver City in Grant County, New Mexico. The Site is shown on the attached map which is Appendix A and which is incorporated into this Order. The Site is situated within the Northeast quarter of Section 2, Township 17 South, Range 14 West. The Site includes without limitation an area of about 4 acres which contains: material discarded during mining and ore processing operations, a water storage reservoir, access roads and other roads which traverse the Site, building foundations (including the mill foundation), the mine portal, and the surrounding areas. The Site also encompasses about 14 acres (bringing total Site acreage to about 18 acres) in and along the streambed of both a small tributary to Little Walnut Creek, the "mill valley tributary", and Little Walnut Creek itself.

30. "State" shall mean the State of New Mexico.

31. "Statement of Work" or "SOW" shall mean the Statement of Work for implementation of the Removal Action for the Site, as set forth in Appendix D to this Order. The Statement of Work is incorporated into this Order and is an enforceable part of this Order.

32. "Submission" includes any and all written materials Respondents are required to produce pursuant to this Order including, but not limited to, correspondence, notifications, plans, reports, specifications, and schedules. A submission is a Deliverable. A Submission is Work. Submissions include, but are not limited to, the Work Plan and the schedule therein. Once a Submission is approved in writing by EPA, the Submission is incorporated into this Order and becomes an enforceable part of this Order.

33. "Tailings and sediment" shall mean the on-Site material that contains hazardous substances at concentrations which exceed the remedial action goals described in the Action Memorandum including without limitation the main (east and west) tailings piles, the cobbed ore pile, mine spoils, western hillside piles, roadbed soils, dust piles, mining and milling wastes, stream bed accumulations, contaminated soils and any other contaminated material of any kind at the Site which material is related to past mining or milling operations. This meaning is the same meaning that the term "tailings and sediment" was given on page 7 of the ROD.

34. "Work" shall mean all activities Respondents are required to perform under this Order including, but not limited to, the SOW and Submissions approved in writing by EPA. Work includes, but is not limited to, Deliverables.

35. "Work Plan" shall mean a plan which shall be developed by Respondents for EPA review and approval. The Work Plan shall include, but shall not be limited to, plans and schedules for the Work which Respondents shall undertake in order to complete the Removal Action. The Work Plan shall also include plans and schedules for the Work which Respondents shall undertake in order to support EPA in the development and implementation of the Community Relations Plan (CRP). The Work Plan shall also include, but shall not be limited to, text which shall guide field Work and laboratory Work, and text which shall guide sampling and analysis Work.

IV. FINDINGS OF FACT

36. The Site occupies about 18 acres approximately 5.5 miles north of Silver City in Grant County, New Mexico. A mine

and mill were operated intermittently at the Site during the period from about 1910 to 1949. Metals extracted were principally lead and zinc. Only foundations of the mill remain. There are no longer any buildings at the Site.

37. Generally speaking, the source of the hazardous substances at the Site is approximately 30,000 cubic yards of tailings from past milling operations at the Site, and 35,000 cubic yards of waste ore. The ore and tailings were dumped and disposed of on the Site during the past milling operations. The tailings and waste ore are located at the headwaters of a small tributary of Little Walnut Creek, an intermittent stream. Precipitation runoff from the Site into the tributary to Little Walnut Creek and subsequently into Little Walnut Creek is acidic (pH is as low as 1.5 in areas of pooled water in the tributary), and contributes to the leaching of metals including without limitation arsenic, beryllium, cadmium, lead and zinc from the tailings and waste ore. In addition, approximately 6,000 cubic yards of tailings and sediment have been deposited along a 1 ½ mile stretch of the tributary stream bed. Tailings and sediment that have washed downstream at the Site may act as a source of contamination when they are contacted by rainwater. Hazardous substances of primary concern include arsenic, beryllium, cadmium, lead and zinc.

38. The Remedial Investigation/Feasibility Study (RI/FS) for the Site was completed by the NMED under a cooperative agreement dated October 1, 1990. On September 22, 1993, EPA issued a ROD, identifying EPA's remedial action for the Site. The remedial action selected by EPA calls for excavation of the tailings and sediment, off-site reprocessing (i.e., milling or remilling) of the tailings and sediment, off-site disposal of any residuals that have concentrations of contaminants above acceptable levels, beneficial reuse of any metals recovered, and on-site ground water monitoring.

39. Respondents agreed to perform the remedial action identified in the ROD, and to pay the United States' response costs, pursuant to the judicial Consent Decree styled United States of America and New Mexico Office of the Natural Resources Trustee v. Bayard Mining Corp. et al., No. 95-0285 MV/LFG (D. New Mexico (Albuquerque)) which was entered June 15, 1995.

40. In 1996, it became apparent that no acceptable mill could be found to reprocess the tailings and sediment from the Site. Accordingly, Respondents and EPA in coordination with NMED undertook an approximately year-long search for alternative disposal areas and acceptable disposal designs for those areas; however, no acceptable, cost-effective alternative disposal area and method were found. Meanwhile, conditions at the Site worsened. Specifically, the rate of migration of tailings and

sediment unexpectedly increased, due to an early season of unusually heavy rains, causing contamination to spread much faster, which may increase the danger to human health and the environment. Consequently, on July 11, 1997, the EPA Region 6 Superfund Division Director, issued the Action Memorandum which calls for the Removal Action.

41. Arsenic, beryllium, cadmium, lead and zinc have come to be located at the Site at concentrations above background levels. The health effects of arsenic, beryllium, cadmium, lead and zinc are described in the Action Memorandum at Section II(a)(4) (Release or threatened release into the environment of hazardous substance, pollutant or contaminant).

42. The danger to public health, or welfare or the environment which may be posed by the arsenic, beryllium, cadmium, lead, and zinc which has been dumped and disposed of on the Site in tailings and sediment is described in Section IV (ENDANGERMENT DETERMINATION) of the Action Memorandum.

43. The Site was listed on the National Priorities List ("NPL") pursuant to CERCLA Section 105, 42 U.S.C. § 9605, on September 8, 1983.

44. Respondent Bayard Mining Corp. ("Bayard") is a Delaware corporation.

45. Bayard owns a portion of the property on which the Site is located, and hazardous substances including without limitation arsenic, beryllium, cadmium, lead and zinc have been dumped and disposed of on the portion of the Site which Bayard owns; furthermore, these hazardous substances have leached and escaped to the other portions of the Site.

46. Respondent Mining Remedial Recovery Company ("MRRC") is a Delaware corporation.

47. MRRC owns a portion of the property on which the Site is located, and hazardous substances including without limitation arsenic, beryllium, cadmium, lead and zinc have been dumped and disposed of on the portion of the Site which MRRC owns; furthermore, these hazardous substances have leached and escaped to the other portions of the Site.

48. Respondent Viacom International Inc. ("Viacom") is a Delaware Corporation.

49. Viacom is the successor to Paramount Communications Inc. which is the successor by merger to corporations which owned a portion of the property on which the Site is located and which operated mining and milling operations on the Site at a time when

arsenic, beryllium, cadmium, lead and zinc and other contaminants in the tailings and sediment were dumped, spilled, and disposed of onto the surface soil at the Site.

50. The conditions present at the facility constitute a threat to public health or welfare or the environment based upon the factors set forth in Section 300.415(b)(2) of the National Oil and Hazardous Substances Pollution Contingency Plan, as amended, 40 CFR Part 300 ("NCP"), and as described in Section III(a) (Threats to Public Health and Welfare) of the Action Memorandum.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the Findings of Fact set forth above, and the Administrative Record supporting the Removal Action, EPA has determined that:

51. The Cleveland Mill Superfund Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

52. Contaminants at concentrations above Site background concentration levels, including, but not limited to, arsenic, beryllium, cadmium, lead, and zinc have come to be located in tailings and sediment on the Site, and these contaminants, which are identified in Section IV (FINDINGS OF FACT) above, are "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

53. Respondents Bayard Mining Corp., Mining Remedial Recovery Company, and Viacom International Inc. are each a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

54. Respondents Bayard Mining Corp. and Mining Remedial Recovery Company are each owners of a facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

55. Respondent Viacom International Inc. (as successor to corporations which were owners and operators of the Site) is an owner and operator of a facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

56. The conditions described in Section IV (FINDINGS OF FACT) above, constitute an actual or threatened "release" of hazardous substances from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

57. The actual or threatened release of hazardous substances at or from the Site, may present an imminent and substantial endangerment to the public health or welfare or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

58. The Removal Action required by this Order is necessary to protect the public health or welfare or the environment, and is not inconsistent with the NCP or CERCLA.

59. Respondents are jointly and severally subject to this Order under section 106(a) of CERCLA, 42 U.S.C. § 9606(a), to abate the endangerment at the Site since Respondents are each liable persons within the meaning of section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

VI. ORDER¹

60. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record for this Site, it is hereby ordered and agreed that Respondents shall comply with the following provisions, including but not limited to all attachments to this Order; and all documents incorporated by reference into this Order including, but not limited to, EPA-approved Submissions; and perform the following actions:

Designation of Contractor, Project Coordinator, and Remedial Project Manager

61. Respondents shall perform the Removal Action required by this Order themselves and/or retain a contractor to perform the Removal Action. Respondents shall notify EPA of Respondents' qualifications or the names and qualifications of such contractor within five business days of the effective date of this Order. Respondents shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Removal Action under this Order at least five days prior to commencement of Work by such contractor(s) or subcontractor(s). EPA retains the right to disapprove of any, or all, of the contractors and/or subcontractors retained by Respondents, or of Respondents' choice of themselves to do the Removal Action. If EPA disapproves of a selected contractor or disapproves of the Respondents, Respondents shall retain a different contractor or notify EPA that Respondents will perform

¹ Note: All time frames in the Order are expressed in calendar days except where noted.

the Removal Action themselves (if Respondents have not already been disapproved by EPA) within five business days following EPA's disapproval and shall notify EPA of that contractor's name and qualifications, or notify EPA of Respondents' qualifications (if Respondents have not already been disapproved) within five business days of EPA's disapproval.

62. Respondents have designated Adrian Brown of Adrian Brown Consultants as their Project Coordinator who shall be responsible for administration of all the Respondents' Work required by the Order. To the greatest extent possible, the Project Coordinator shall be present on the Site or readily available during Work on the Site. EPA retains the right to, at any time, disapprove of any Project Coordinator named by Respondents. If EPA disapproves of a selected Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within five business days following EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by Respondents.

63. EPA has designated Kathleen Aisling of the EPA Region 6 Superfund Division, as its Remedial Project Manager (RPM) for the Site. Respondents shall direct all submissions required by this Order to RPM Kathleen Aisling, U.S. Environmental Protection Agency Region 6 (6SF-LT), 1445 Ross Avenue, Dallas, Texas 75202-2733. All submissions shall be sent by overnight courier or by both first class mail and by certified mail with return receipt requested. EPA and Respondents shall have the right, subject to the immediately preceding paragraph, to change their designated RPM or Project Coordinator respectively. Respondents shall notify EPA, five business days before such a change is made. The initial notification of a change in Respondents' Project Coordinator may be orally made, but it shall be promptly followed by a written notice.

64. Respondents have designated Wendy Meyer of Adrian Brown consultants as their Removal Action Quality Assurance Official ("Removal Action QAO"), independent of any construction contractor, and independent of the Project Coordinator, to conduct a quality assurance program during the Removal Action. The Removal Action QAO may come from Respondents' own staff, from a contractor's organization, or from a private consulting entity. To the greatest extent possible, the Removal Action QAO shall be present on the Site or readily available during Work on the Site. EPA retains the right to, at any time, disapprove of any Removal Action QAO named by Respondents. If EPA disapproves of a selected Removal Action QAO, Respondents shall retain a different Removal Action QAO and shall notify EPA of that person's name, address,

telephone number, and qualifications within five business days following EPA's disapproval.

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EPA Review of Submissions

65. In all instances in which this Order requires a Submission (other than weekly progress reports described in Section VI, paragraph 76 (Reporting)), to EPA, the Submission must be accompanied by the following certification signed by an authorized corporate officer of each of the Respondents:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

66. For the purpose of this certification, an "authorized corporate officer" means a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar decision-making functions for the corporation.

67. After review of any Submission, EPA may:

(a) approve the Submission; (b) approve the Submission with modifications required by EPA which modifications may include, but may not be limited to, written passages prepared by EPA which passages Respondents shall incorporate, word-for-word, into the text of the Submission as directed by EPA in writing, and which modifications may also include, but may not be limited to, EPA-required deletions of certain passages contained in the Submission which deletions Respondents shall make, word-for-word, as directed by EPA in writing; (c) disapprove the Submission and direct Respondents to re-submit the Submission after incorporating EPA's modifications which modifications may include, but may not be limited to, written passages prepared by EPA which passages Respondents shall incorporate, word-for-word, into the text of the Submission as directed by EPA in writing, and which modifications may also include, but may not be limited to, EPA-required deletions of certain passages contained in the Submission which deletions Respondents shall make, word-for-word, as directed by EPA in writing; or (d) disapprove the Submission and assume responsibility for performing all or any part of the Removal Action. As used in this Order including, but not limited to the SOW, the terms "approved by EPA", "approval by EPA", "EPA approval," or a similar term means the action described in (a) or

(b) of this paragraph. Once approved by EPA in writing, as described in (a) or (b) of this paragraph, a Submission shall be fully enforceable under this Order.

68. In the event of approval or approval with modifications by EPA, Respondents shall proceed to take any action required by the Submission as approved or modified by EPA.

69. Upon receipt of a notice of disapproval or a request for a modification, Respondents shall, within fourteen (14) days or such longer time as specified by EPA in its notice of disapproval or request for modification, correct the deficiencies and resubmit the Submission for approval. Notwithstanding the notice of disapproval, or approval with modifications, Respondents shall proceed, at the written direction of EPA, to take any action required by any non-deficient portion of the Submission.

70. If any Submission by Respondents is not ultimately approved by EPA, Respondents shall be in violation of this Order.

Work to Be Performed

71. Respondents shall perform, at a minimum, the Work described in this Order and in the SOW (Appendix D).

Health and Safety Plan

72. Within 10 days after the effective date of this Order, Respondents shall submit for EPA review and comment a Plan that ensures the protection of the public health and safety during performance of on-Site Work under this Order. This plan shall be prepared in accordance with EPA's current Standard Operating Safety Guide, dated November 1984, and currently updated July 1988, or whatever EPA guidance document is currently applicable as determined by EPA. In addition, the plan shall comply with all current applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 CFR Part 1910. Respondents shall incorporate all changes to the plan recommended by EPA, and implement the plan during the pendency of the Removal Action.

Quality Assurance and Sampling

73. All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondents shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the EPA

guidance as appropriate as determined by EPA. Respondents shall follow the following documents, as appropriate as determined by EPA, as guidance for QA/QC and sampling: "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures," OSWER Directive Number 9360.4-01; "Environmental Response Team Standard Operating Procedures," OSWER Directive Numbers 9360.4-02 through 9360.4-08; and "Data Quality Objectives for Remedial Response Actions", EPA 540/G-87/003a, OSWER Directive Number 9335.0-7b.

74. Upon request by EPA, Respondents shall have any laboratory used by Respondents analyze samples submitted by EPA for QA monitoring. Respondents shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

75. Upon request by EPA, Respondents shall allow EPA or its authorized representatives to take split and/or duplicate samples of any samples collected by Respondents while performing Work under this Order. Respondents shall notify EPA not less than 7 days in advance of any sample collection activity, unless a shorter period is agreed to by the EPA. EPA shall have the right to take any additional samples that it deems necessary.

Reporting

76. Respondents shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order every seventh day after the date of receipt of EPA's approval of the Work Plan until termination of this Order, unless otherwise directed by the RPM in writing. These reports shall describe all significant developments during the preceding seven-day period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

Conveyance of real property

77. If Respondents own any portion of the Site, Respondents shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice that the property is subject to this Order to the transferee and written notice to EPA of the proposed conveyance, including the name and address of the transferee. Respondents agree to require that their successors comply with the immediately preceding sentence and paragraphs 79 and 80 (Access to Property and Information).

Final Report

78. Within 30 days after completion of the Removal Action required under this Order, Respondents shall submit for EPA review, and approval, a final report summarizing the actions taken to comply with this Order. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports". The final report shall include a listing of quantities and types of materials removed off-Site or disposed of on-Site, a listing of the ultimate destination of those materials removed off-site (if any), a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the Removal Action (e.g., manifests, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Access to Property and Information

79. Respondents shall provide, and/or obtain access to the Site and off-Site areas to which access is necessary to implement this Order, and provide access to all nonprivileged records and documentation within the possession or control of the Respondents or prepared by Respondents and their consultants and contractors related to the conditions at the Site and the actions conducted pursuant to this Order. Such access shall be provided to EPA employees, contractors, agents, consultants, designees, representatives, and State of New Mexico representatives, and other agencies with jurisdictional interest. These individuals shall be permitted to move freely at the Site and appropriate off-Site areas, as determined by EPA, in order to conduct actions which EPA determines to be necessary. Respondents shall submit to EPA, within 10 days of receipt, the results of all sampling or tests and all other data generated by Respondents or their contractors, or on the Respondents' behalf during implementation of this Order.

80. Where action under this Order is to be performed in areas owned by or in possession of someone other than Respondents,

Respondents shall use their best efforts to obtain all necessary access agreements within 5 days after the effective date of this Order, or as otherwise specified in writing by the RPM. Respondents shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. Respondents shall describe in writing their effort to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the Removal Action, using such means as EPA deems appropriate. Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access.

Record Retention, Documentation, Availability of Information

81. Respondents shall preserve all documents and information in their possession or control relating to Work performed under this Order, or relating to the hazardous substances found on or released from the Site, for ten years following completion of the Removal Action required by this Order. At the end of this 10-year period and 30 days before any document or information is destroyed, Respondents shall notify EPA that such documents and information are available to EPA for inspection and, upon request, shall provide the originals or copies of nonprivileged documents and information to EPA. In addition, Respondents shall provide nonprivileged documents and information retained under this Section at any time before expiration of the 10-year period at the written request of EPA.

82. Respondents may assert a business confidentiality claim pursuant to 40 CFR § 2.203(b) with respect to part or all of any documents or information submitted to EPA pursuant to this Order, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Analytical and other data specified in Section 104(e)(7)(F) of CERCLA shall not be claimed as confidential by Respondents. EPA shall disclose information and documents covered by a business confidentiality claim only to the extent permitted by, and by means of the procedures set forth at, 40 CFR Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Respondents.

83. Respondents shall maintain a running log of privileged documents on a document-by-document basis, containing the date, author(s), addressee(s), subject, the privilege or grounds claimed (e.g., attorney work product, attorney-client), and the factual basis for assertion of the privilege. Respondents shall keep the "privilege log" on file and available for inspection. EPA may at any time challenge claims of privilege.

Off-site Shipments

84. All hazardous substances, pollutants or contaminants removed off-site pursuant to this Order for treatment, storage, or disposal shall be treated, stored, or disposed of at a facility in compliance, as determined by EPA, with CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and the following rule: "Amendment to the National Oil and Hazardous Substances Pollution Contingency Plan; Procedures for Planning and Implementing Off-Site Response Action: Final Rule." 58 FR 49200 (September 22, 1993), and codified at 40 CFR § 300.440. Regional Offices will provide information on the acceptability of a facility under CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and the above-referenced rule. Respondents shall give prior notification of out-of-state waste shipments in a manner consistent with OSWER Directive 9330.2-07.

Compliance With Other Laws

85. Respondents shall perform all Work required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in CERCLA Section 121(e) and 40 CFR Section 300.415(i). In accordance with 40 CFR Section 300.415(i), Respondents shall, to the extent practicable as determined by EPA considering the exigencies of the situation, perform all on-Site Work required pursuant to this Order in a manner which attains ARARs. (See "The Superfund Removal Procedures: Guidance on the Consideration of ARARs During Removal Actions," OSWER Directive No. 9360.3-02, August 1991).

Emergency Response and Notification of Releases

86. If any incident, or change in Site conditions, during the Work conducted pursuant to this Order causes or threatens to cause an additional release of hazardous substances from the Site in excess of a reportable quantity ("RQ") within the meaning of Section 102 of CERCLA, 42 U.S.C. § 9602, and as listed in the Statutory RQ column of Table 302.4 (40 CFR § 302.4), or to cause an endangerment to the public health, welfare, or the environment, Respondents shall immediately take all appropriate actions. Respondents shall take these actions in accordance with all applicable provisions of this Order including, but not limited to, the Health and Safety Plan in order to prevent, abate or minimize such release, or endangerment caused or threatened by the release. Respondents shall also immediately notify the RPM or his/her supervisor or, in the event of his/her unavailability, shall notify the Regional Duty Officer, EPA Region 6 Emergency Response Branch, (214) 665-2270 or the EPA Region 6 24-Hour

Emergency Hotline Number at (214) 665-2222 of the incident or Site conditions. If Respondents fail to respond, EPA may respond to the endangerment, and EPA reserves its right to pursue cost recovery.

87. In addition, in the event of a release of a hazardous substance from the Site in excess of a RQ, Respondents shall immediately notify EPA's RPM at (214) 665-2222 and the National Response Center at (800) 424-8802. Respondents shall submit a written report to EPA within seven days after each release in excess of a RQ, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, not in lieu of, reporting under CERCLA Section 103(c) and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. Sections 11001 et seq.

VII. AUTHORITY OF THE EPA REMEDIAL PROJECT MANAGER

88. The RPM shall oversee Respondents' implementation of this Order. The RPM shall have the authority vested in an RPM and an On-scene Coordinator by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other Removal Action undertaken at the Site. Absence of the RPM from the Site shall not be cause for stoppage of Work unless specifically directed by the RPM in writing.

VIII. REIMBURSEMENT OF COSTS

89. Respondents shall pay EPA for all future response costs, not inconsistent with the NCP, paid by the United States. Payment of future response costs under this Order does not affect Respondents' obligation to pay EPA's costs under the Consent Decree which costs are unrelated to the Removal Action. EPA may require Respondents to pay costs under this Order by billing the Respondents for costs already paid, or by demanding that Respondents pay an estimate of what EPA projects as its costs for any given future six-month period; however, whenever EPA demands that the Respondents pay an estimate of future response costs, EPA's demand is limited to \$30,000 for any given future six-month period. That is, EPA may bill Respondents for more than \$30,000 for costs already paid by EPA in any given six-month period, and Respondents shall pay for EPA costs paid as described in the paragraphs which follow; however, EPA may not demand any more than \$30,000 for response costs which EPA estimates it will pay in a future six-month period.

Billing for costs which EPA has already paid

90. From time to time, EPA shall submit to Respondents a bill for future response costs that includes a Cost Documentation Management System (CDMS) report or a Superfund Cost Recovery Enhancement System (SCORES) report or whatever documents EPA considers, at that time, to be the equivalent of a CDMS or SCORES report. The CDMS report or the SCORES report or their equivalent, as determined by EPA, shall serve as the sole accounting of all response costs and as the sole basis for EPA's bills. Respondents shall, within 30 days of receipt of the bill, submit a cashier's, certified, or corporate check for the amount of the bill made payable to the "Hazardous Substance Superfund," at the following address:

Regional Hearing Clerk (6RC)
U.S. Environmental Protection Agency
P.O. Box 360582M
Pittsburgh, Pennsylvania 15251

Respondents shall include the name of the Site (Cleveland Mill Superfund Site) and the Site special account identification number, which is "G9," the account number which is CERCLA NMD981155930, and the docket number and title of this Order in a notation on all checks. No Respondents' payment is considered made, under this Order, until the check is received by EPA.

91. Respondents shall simultaneously submit a copy of all checks and transmittal letters to the RPM. The transmittal letter for each check shall designate the check as "Removal Action Response Costs - Cleveland Mill Superfund Site" and shall reference the payor's name and address, the name of the Site and the Site identification number, which is Special Account G9, the account number which is CERCLA NMD981155930, and the docket number and title of this Order.

92. In the event that Respondents do not pay all of the future response costs as billed within 45 days of the date printed on the bill, Respondents shall pay interest on the unpaid balance. The interest rate shall be the rate established by the Department of the Treasury pursuant to 31 U.S.C. § 3717 and 4 CFR § 102.13. The interest on future response costs shall begin to accrue on the date printed on the bill. Interest shall accrue at the rate specified through the date of the payment. Payments of interest made under this paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of

Respondents' failure to make timely payments.

EPA may require Respondents to pay an estimate of future response costs for any given six-month period

93. From time to time, EPA may demand that Respondents pay an estimate of what EPA projects as its costs for any given future six-month period; however, whenever EPA demands that the Respondents pay an estimate of future response costs, EPA's demand is limited to \$30,000 for any given future six-month period. Within 45 days of the date of EPA's demand for payment, Respondents shall pay EPA the amount which EPA demands in its estimate. Respondents shall follow and be subject to the provisions of paragraphs 90 through 92 of this Order with respect to the payments of these estimates except that EPA will provide the estimate and not a CDMS or SCORES report, and Respondent shall pay the estimate; moreover, Respondents shall refer to Special Account number G9; furthermore, under no circumstances shall Respondents be required to pay interest on EPA's estimates of future response costs.

94. Respondents may dispute, under the dispute resolution provisions of this Order, all or part of a bill for future response costs submitted under this Order for the following reasons only: (1) if Respondents allege that EPA has made an accounting error; or (2) if Respondents allege that a cost item is inconsistent with the NCP.

95. If any dispute over costs is resolved, under the dispute resolution provisions of this Order, before payment is due, the amount due will be adjusted as determined in the written agreement reached or in the final binding decision made under the dispute resolution provisions of this Order. If the dispute is not resolved before payment is due, Respondents shall pay the full amount of the uncontested costs to the Hazardous Substance Superfund as specified in this Order on or before the due date. Within the same time period, Respondents shall pay the full amount of the contested costs into an interest-bearing escrow account with instructions to the account trustee that the trustee is to pay the account balance, including interest, as instructed by the EPA Region 6 Superfund Division Director. Respondents shall simultaneously submit a copy of both checks, and their respective transmittal letters, to the RPM.

IX. DISPUTE RESOLUTION

96. Any dispute which arises shall first be the subject of informal negotiations between EPA's RPM and Respondents' Project Coordinator. The period for informal negotiations shall

not exceed five days from the time the dispute arises. The dispute shall be considered to have arisen when one party sends the other party a written Notice of Dispute. Any agreement reached as the result of informal negotiations shall be memorialized in writing by EPA and signed by the RPM and the Project Coordinator, and shall include an agreement as to the distribution of any escrow funds established by Respondents.

97. In the event that informal dispute resolution does not resolve the dispute, the Branch Chief for the EPA Region 6 Superfund Division Louisiana/New Mexico Branch (or an equivalent EPA management official) and appropriate representatives of Respondents shall negotiate to attempt to resolve the dispute within 14 days from the time that the dispute arises, unless a longer time is agreed to by the parties (EPA's decisions regarding extensions of time for dispute resolution are not subject to dispute resolution). Any agreement reached as the result of informal negotiations shall be memorialized in writing by EPA and signed by EPA's Branch Chief or equivalent EPA manager and by Respondents' representatives, and shall include an agreement as to the distribution of any escrow funds established by Respondents. If the EPA Branch Chief (or equivalent manager) and the Respondents' representatives do not resolve the dispute within the 14 days from the time that the dispute arises (or such longer time as agreed to by the parties under the terms of this paragraph), then the EPA Region 6 Superfund Division Director (or equivalent EPA manager) will issue a final decision resolving the dispute, based on any written materials submitted by the parties during the 14-day period (or such longer time as agreed to by the parties under the terms of this paragraph) which began at the time that the dispute arose. The Superfund Division Director's (or equivalent EPA manager's) decision shall be binding, under this Order, upon the parties.

98. Following resolution of the dispute as provided by this Section, the Superfund Division Director (or equivalent EPA manager) will write to the trustee of any escrow account established by Respondents pursuant to this Order, and instruct the trustee to pay the escrow funds as agreed to in writing by the RPM and the Project Coordinator under this Section, or as agreed to in writing by the EPA's Branch Chief (or equivalent EPA manager) and the Respondents' representatives under this Section, or as the Superfund Division Director (or equivalent EPA manager) decided in his/her final binding decision, as appropriate as determined by EPA.

99. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the written agreement reached or with the Superfund Division Director's (or equivalent EPA manager's) written decision, whichever occurs.

Both the written agreement and the Superfund Division Director's (or equivalent EPA manager's) decision are requirements of this Order. No EPA decision made pursuant to this Section shall constitute a final agency action giving rise to judicial review.

X. FORCE MAJEURE

100. Respondents agree to perform all requirements of this Order within the time limits established under this Order, including but not limited to schedules established in EPA-approved submissions, unless the performance is delayed by a force majeure. For purposes of this Order, a force majeure is defined as any event arising from causes beyond the control of Respondents or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, that delays or prevents performance of any Work under this Order despite Respondents' best efforts to perform the Work. Force majeure does not include financial inability to complete requirements of this Order or increased cost of performance of the requirements of this Order.

101. Respondents shall notify EPA orally within 48 hours after Respondents become or should have become aware of events which constitute a force majeure, and in writing within five days after Respondents become or should have become aware of events which constitute a force majeure. Such notice shall: identify the event causing the delay or anticipated delay; estimate the anticipated length of delay, including necessary demobilization and re-mobilization; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures. Respondents shall take all reasonable measures ~~to~~ avoid and minimize the delay in Respondents' performance of the requirements of this Order. Failure to comply with the notice provision of this Section shall waive any claim of force majeure by Respondents.

102. If EPA determines a delay in performance of a requirement of this Order is or was attributable to a force majeure, the time period for performance of that requirement of this Order shall be extended as deemed necessary by EPA. Such an extension shall not alter Respondents' obligation to perform or complete other requirements of this Order which were not directly